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No. 85-1798

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IN THE

Supreme Court of the United States

October Term, 1986

PENNZOIL COMPANY,

Appellant,

v.

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE STATES OF ALABAMA, DELAWARE, FLORIDA, KANSAS, LOUISIANA, MINNESOTA, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, WASHINGTON and WYOMING

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This *amicus curiae* brief is submitted on behalf of the States of Alabama, Delaware, Florida, Kansas, Louisiana, Minnesota, Missouri, Montana, New Mexico, New York, Okla-

homa, Washington and Wyoming. These states appear here to express interest in this case and support for the position of Appellee, and briefly to state the nature of that interest and support.

Texaco is an important corporate citizen of our states and the nation as a whole. The economic well-being of each of our states and of our citizens would be directly and adversely affected by the dismemberment of Texaco. Texaco's contribution to the economic well-being of each of our states—and of the nation as a whole—is considerable. Many of our citizens are present or retired employees of Texaco, owners of Texaco securities, or recipients of royalties from Texaco. Moreover, Texaco provides to each of our states significant tax revenues and constitutes an important presence in our states through its ownership of real property and other assets. Texaco also provides substantial indirect contributions to the economies of our states as a supplier of petroleum products and as a purchaser of goods and services.

We believe that a Texaco bankruptcy would inflict enormous harm on our states and citizens. If the $11 billion state court judgment were to be subjected to appellate review and affirmed, the damage to our states would be significant. If such damage were inflicted *before* appellate review, that would be especially tragic: our citizens could fairly wonder what kind of judicial system would permit the nation's sixth largest corporate enterprise to be forced into bankruptcy, causing tremendous damage beyond Texaco, on the basis of a trial court's judgment not subjected to full appellate review.

In reaching its decision to grant injunctive relief, the federal district court correctly recognized the public interest. We reaffirm to this Court the weight and strength of that interest. Texaco should not be forced to seek protection under the federal bankruptcy laws in order to prevent execution on the $11 billion judgment prior to exercising its right to appeal that judgment to the Texas appellate courts. The decision of the court below merely ensured that the Texas appellate courts'

review of the merits of the unprecedented judgment would be meaningful. Such review could not be meaningful if the judgment's enormous effects were inflicted on Texaco and the public before the judgment was final. For that reason, the decision of the court below should be affirmed.

The interest of our states is heightened by the fact that Texaco's appeal of the $11 billion judgment, currently proceeding in the Texas appellate courts, raises issues involving the laws and underlying policies of sister states (New York and Delaware), as well as federal law and policy, which are important to each of the sovereign states and, we believe, to our nation as a whole. Both New York and Delaware have taken the extraordinary step of filing *amicus* briefs in the Texas Court of Appeals and have minced no words in asserting that the trial court's judgment should be reversed because it was based upon significant misapplication of their law by the Texas trial judge. (The New York and Delaware briefs filed in the Texas Court of Appeals are annexed hereto as Appendix A and B respectively.) Seven other states (Alabama, Alaska, Kansas, Louisiana, New Mexico, Oklahoma and Wyoming) have also appeared in the Texas Court of Appeals to express concern over the apparent failure of the Texas trial judge properly to apply a sister state's law and the potential implications for interstate comity and commerce, and to urge reversal of the trial court's judgment.

Our states would be concerned as a matter of principle over any failure by a trial court in one state properly to apply the laws of a sister state because the principle of mutual respect is so profoundly important to the viability of our nation, composed as it is of 50 sovereign states. The extraordinary level of concern warranting the participation of our states as *amici* in the litigation between Texaco and Pennzoil is the result of two factors.

First, New York State itself has taken the extraordinary step of appearing as *amicus* in the state appellate proceedings to contend that its substantive commercial law, and the policies

underlying that law, were misapplied by the Texas trial judge.[1] The importance of New York commercial law is not confined to New York. New York is a commercial center, and, as a result, business transactions throughout the nation are governed or affected by its commercial law. Other states, and our nation as a whole, have historically looked to New York for leadership in the development of commercial law, and most states share with New York common legal concepts and policies regarding the regulation of commercial activity.

Although ours is a national economy, commercial activity is still primarily and rightfully regulated by state law. The multi-state character of many business transactions does not necessarily require or even justify federal legislation establishing national uniformity. It does, however, necessitate fair and clearly ascertainable state standards of conduct rationally developed and consistently applied by courts in all of the 50 states. The important role of states in the regulation of the national economy is preserved by the recognition and respect each state accords the applicable law of its sister states. In this case, New York's law apparently was not properly respected.

Similarly, Delaware contends that its laws governing the fiduciary duties of corporate directors were misapplied by the Texas trial court.[2] Delaware law governs the internal affairs of

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[1] There was no dispute at the trial that the law of New York governed the substantive contract and tort law issues in the case. The New York brief concludes (at A-3):

> "Because the jury charge failed to include [proper] instructions and misstated numerous principles of New York law, the judgment of the trial court should be reversed."

[2] The law of Delaware was relevant to the issues presented in the Texas trial because of Texaco's contention that, even if (contrary to law and fact) Pennzoil had entered into a contract with Getty Oil Company prior to concluding a deal with Texaco, such a contract would have been a breach of fiduciary duty by the Getty directors, and therefore unenforceable. This is significant because, under New York law, one cannot be held liable for interference with an unenforceable contract, absent exceptional, egregious, wrongful conduct (*i.e.*

corporations across the nation and, as with the commercial law of New York, other states and our nation as a whole have long looked to Delaware for leadership in developing principles of corporate governance.

Second, in the absence of the relief granted by the courts below, the enormous harm arising out of what both New York and Delaware unequivocally contend was a misapplication of their law would have been irreversibly inflicted upon Texaco and the public without any appellate court having had the opportunity to consider the merits of those contentions. The judgment in this case is of such unprecedented magnitude that permitting the judgment creditor to execute or attach liens prior to appeal would in fact preclude full and meaningful judicial consideration of the profoundly important issues to be raised on appeal.

Unlike many cases implicating the appropriate limits of federal jurisdiction, the litigation between Texaco and Pennzoil, as it now stands, implicates issues of federalism other than the proper allocation of authority between state and federal institutions. If Texaco cannot obtain a full review of the judgment against it before that same judgment forces it into a bankruptcy, then our federal system—in which states are required and expected to respect each other's laws and policies —will not have functioned as intended. As a consequence, the

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fraud) by the tortfeasor, which no one has ever claimed to be present here.

In his charge to the jury, the Texas trial judge (to use Pennzoil's own words) " 'advised the jury that the status of the Getty entities as fiduciaries was not relevant to the interference issue' ". (*See* the Delaware brief at B-4.) In its brief, Delaware asserts unequivocally (at B-4) that the Texas trial court's instruction to the jury concerning the Getty Board's fiduciary duties under Delaware law was "incorrect" and "constitutes plain error". Delaware states (at B-1) that it "has concluded that fundamental principles of Delaware law governing the fiduciary duties of directors of Delaware corporations have not been reflected properly in the judgment below".

benefits to our national economy that are secured by that system of mutual respect will needlessly be diminished.[3]

We understand and do not question the determination of the Texas legislature to provide for automatic supersedeas and lien procedures not requiring judicial oversight or intervention. Like Texas, several other states have similar supersedeas bond and judgment lien provisions which serve the purpose of protecting judgment creditors during the pendency of appeals. We also recognize, however, that there will be cases (albeit extremely rare) in which strict adherence to such procedures will produce results that are so irrational as to conflict with constitutional principles. Given the lack of any state interest in such strict adherence in a purely private dispute (not involving any state official or agency), we do not believe it to be an affront to state sovereignty for a federal court to deal with such rare cases in the manner that the court below has dealt with this case.

In this case, the Texas supersedeas bond requirement would, according to the findings of the district court, require Texaco to post a $13 billion bond (the amount of the judgment plus interest and costs)—a bond which no litigant could post because it exceeds by a factor of seven the estimated worldwide bonding capacity. In the absence of such a bond, Pennzoil

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[3] In addition to the state law questions presented by the judgment, federal law questions are also raised. The judgment has already had an impact on those federal issues. The Wall Street Journal recently reported:

> "This 'post-Texaco' climate of uncertainty is having a chilling effect on bidding competition. Some companies, accustomed to vicious bidding wars in the mergers and acquisitions market, have grown gun-shy in the wake of the Texaco verdict, especially when a potential target has entered any type of agreement with a third party. Some boards of directors, meanwhile, have had to grudgingly accept lower bids for their companies' assets rather than risk being sued for breach of contract by an angry bidder." (WSJ 4/15/86 at 1, 17)

The federal, as well as the state, issues deserve full review before Texaco is forced into bankruptcy.

could seek to execute upon the judgment. Moreover, even if such a bond could be posted, Pennzoil would be entitled under the Texas lien statute to impose liens on Texaco's assets in the full amount of the judgment. Importantly, the execution on the judgment or imposition of judgment liens would occur without any state official exercising discretion as to whether such result would be appropriate or in the public interest.

The district court found that the threat of immediate execution on the judgment or the imposition of judgment liens on Texaco's properties in Texas would force Texaco to seek protection under the United States Bankruptcy Code. The resulting disruption and harm would obviously extend beyond Texaco to irreparably damage the individuals, organizations and states that are in one way or another dependent upon Texaco. The national interest would also be irreparably damaged. On the other hand, as the Second Circuit observed, "there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full" and, indeed, the district court explicitly found that Pennzoil had conceded (and in fact repeatedly asserted) this point.

Under these circumstances, unmitigated application of the Texas lien and bond provisions would produce an irrational result. That does not mean that the Texas judgment security provisions, which, as noted, are similar in intent and form to the security provisions of several of our states, are unconstitutional or in need of amendment. Rather, it means only that relief can be sought and granted in the federal courts in very rare cases, such as the case now before this Court, (i) where the judgment arises out of purely private litigation in which no state official or agency is involved, (ii) where there is concededly no need for security in the magnitude required by the law, (iii) where the bonding capacity necessary to satisfy the requirement indisputably does not exist,[4] (iv) where the enforcement of the

[4] We do not read the decision below as requiring an affordable supersedeas bond for all litigants; indeed, the court below made very clear that it was not suggesting such a requirement.

security provisions is solely in the discretion of a private party, unchecked by any state official's exercise of discretion, and (v) where the irreparable damage that would result from the unmitigated application of the security provisions is devastating to both private and public interests.[5] The states have no interest in the irrational application of generally sound security provisions in a purely private lawsuit.

The decision below is not offensive to states. On the contrary, the federal injunctive relief is appropriate and carefully limited, and serves the interest of federalism by ensuring that the enforcement by a private party of one state's rules in an irrational manner does not harm the legitimate interests of other states and unnecessarily disrupt interstate commerce upon which all states and the nation as a whole depend. The federal injunction has had no adverse effect on the ability of the Texas appellate courts to review the judgment of the state trial court. Rather, it insured that state appellate review would be meaningful. Given the district court's findings that time was of the essence, that timely relief might not have been available in the state courts, that there would be no damage to Pennzoil if federal injunctive relief were granted and that, if such relief were not granted, Texaco and the public would be irreparably damaged, we firmly believe that the Second Circuit's decision was correct under the principles articulated in the relevant case law. To permit appellate review only at the expense of a bankruptcy filing by Texaco prior to complete appellate review—which in itself would result in significant federal intervention—would effectively thwart meaningful review of a judgment which no one can seriously argue should not be subjected to appellate scrutiny before its destructive consequences are unleashed, and would subject numerous states and their citizens to unnecessary and potentially severe disruption.

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[5] We do not read the decision below as impinging upon the exercise of powers by state courts which states might have a significant interest in protecting, such as the power to punish contempt by a state court litigant.

We also believe that there are important state and national principles that would be undermined by the devastating consequences that would flow from Texaco's loss of the protection provided by the federal injunction. Among other consequences, the spectacle of a Texaco bankruptcy based on a Texas trial court's apparent failure properly to apply the laws of its sister states (New York and Delaware) might very well undermine respect for federalism and states' rights upon which our nation is based.

For these reasons, we urge that the decision of the United States Court of Appeals for the Second Circuit in this matter be affirmed.

Respectfully submitted,

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APPENDIX A

No. 01-86-00216-CV

IN THE

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FOR THE

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TEXACO, INC.,
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ON APPEAL FROM THE 151ST DISTRICT COURT,
HARRIS COUNTY, TEXAS

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK*

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	A-1
SUMMARY OF ARGUMENT	A-2
ARGUMENT	A-4
I. THE SPECIAL ISSUES AND JURY INSTRUCTIONS FAILED TO DESCRIBE ACCURATELY THE ELEMENTS OF THE NEW YORK CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS	A-4
A. Introduction	A-4
B. Special Issue No. 1 And The Accompanying Jury Instructions Fail To Describe Accurately The Law Governing The First Element Of The Cause Of Action—The Existence of A Valid Contract	A-6
1. The Trial Judge's Refusal To Advise The Jury Of The Four-Factor "Intent" Test Constituted Reversible Error	A-6
2. The Jury's Affirmative Response To Special Issue No. 1 Does Not Establish That The Jury Believed That Pennzoil And The Gettys Entered Into A Valid Contract Effective January 3, 1984	A-9
3. The Jury Instructions Accompanying Special Issue No. 1 Are Defective For Additional Reasons	A-11
C. Special Issue No. 2 And The Accompanying Jury Instructions Fail To Describe Accurately The Additional Elements of the Cause Of Action For Intentional Interference With Contractual Relations	A-15
1. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect The Emphasis New York Law Places On Actual Knowledge Of The Contract	A-16

Page

2. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect New York's Focus On Improper Interference A-18

a. The Jury Should Have Been Instructed That An Agreement To Agree Or An Oral Contract For the Sale Of Securities Is Entitled To Protection From Interference Only Where Unlawful Means Are Used A-20

b. The Jury Should Have Been Instructed That Whether Texaco's Interference Was Proper Depends Upon Whether Its Conduct Was Reasonable In View Of All The Circumstances A-21

II. THE SPECIAL ISSUES AND JURY INSTRUCTIONS PERTAINING TO PUNITIVE DAMAGES WERE INADEQUATE A-24

III. CERTIFICATION OF THE DISPOSITIVE QUESTIONS OF NEW YORK LAW TO THE COURT OF APPEALS OF NEW YORK IS APPROPRIATE IF THIS COURT CONCLUDES THAT NEW YORK LAW IS UNCLEAR A-27

CONCLUSION A-28

TABLE OF AUTHORITIES

CASES: Page

AA Tube Testing Co. v. Sohne, 20 A.D.2d 639, 246 N.Y.S.2d 247 (2d Dept. 1964) A-16

Alvord & Swift v. Stewart M. Muller Constr. Co., 46 N.Y.2d 276, 413 N.Y.S.2d 309 (1978) A-4, A-15

American Cyanamid Co. v. Elizabeth Arden Sales Corp., 331 F. Supp. 597 (S.D.N.Y. 1971) A-17

Anthony v. George T. Bye, Inc., 243 A.D. 390, 277 N.Y.S. 222 (1st Dept. 1935) A-25

Banking & Trading Corp. v. Floete, 257 F.2d 765, 769 (2d Cir. 1958) A-7

Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp., 41 N.Y.2d 397, 393 N.Y.S.2d 350 (1977) A-7, A-11

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Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (2d Cir. 1949) A-18

Dickson v. Mitchell, 87 A.D.2d 697, 448 N.Y.S.2d 861 (3d Dept. 1982) A-9

Entertainment Events, Inc. v. MGM, No. 74 Civ. 2959 (S.D.N.Y. May 31, 1978) A-16, A-17

Gravitt v. Newman, ____ A.D.2d ____, 495 N.Y.S.2d 439 (2d Dept. 1985) A-25

Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980) A-4, A-5, A-14, A-19, A-20, A-21

Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 67 A.D.2d 658, 412 N.Y.S.2d 623 (1st Dept. 1979), *modified on other grounds*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980) A-25

International Telemeter Corp. v. Teleprompter Corp., 592 F.2d 49 (2d Cir. 1979) A-8, A-9, A-12

Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673 (2d Cir. 1972) ... A-12

Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956) A-4, A-6, A-13

	Page
Huschle v. Battelle, 33 A.D.2d 1017, 308 N.Y.S.2d 235 (1st Dept. 1970)	A-25
Kelly v. Central Hanover Bank & Trust Co., 11 F. Supp. 497 (S.D.N.Y. 1935), *rev'd on other grounds*, 85 F.2d 61 (2d Cir. 1936)	A-17
Kleinschmidt Div. of SCM Corp. v. Futuronics Corp., 41 N.Y.2d 972, 395 N.Y.S.2d 151 (1977)	A-13
Optivision, Inc. v. Syracuse Shopping Center, 472 F. Supp. 665, 685 (N.D.N.Y. 1979)	A-20
Phillipson v. Hexalon Real Estate, Inc., 111 A.D.2d 126, 489 N.Y.S.2d 506 (1st Dept. 1985)	A-25
Pinnacle Books, Inc. v. Harlequin Enterprises, Ltd., 519 F. Supp. 118 (S.D.N.Y. 1981)	A-7, A-9, A-10
Reprosystem, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), *cert. denied*, 105 S.Ct. 110 (1984)	A-8, A-9, A-12
R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (2d Cir. 1984)	A-7, A-8
Rossi v. Kelly, 96 A.D.2d 451, 465 N.Y.S.2d 1 (1st Dept. 1984)	A-5
Rudoff v. Huntington Symphony Orchestra, 91 Misc. 2d 264, 397 N.Y.S.2d 803 (Sup. Ct. App. Tm. 1977)	A-22
Scheck v. Francis, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970)	A-7
Schwartz v. Greenberg, 304 N.Y. 250, 107 N.E.2d 65 (1952)	A-7
Susskind v. Ipco, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dept. 1975)	A-20
United Euram Corp. v. Occidental Petroleum Corp., 123 Misc. 2d 574, 474 N.Y.S.2d 372 (Sup. Ct. N.Y. Co. 1984)	A-5, A-22
V'Soske v. Barwick, 404 F.2d 495 (2d Cir. 1968)	A-12, A-13
Walker v. Sheldon, 10 N.Y.2d 401, 223 N.Y.S.2d 488 (1961)	A-25
Willmott v. Giarraputo, 5 N.Y.2d 250, 184 N.Y.S.2d 97 (1959)	A-9, A-13

Page

Winston v. Mediafare Entertainment Corporation, 777 F.2d 78 (2d Cir. 1985) A-7, A-11

STATUTES AND RULES:

New York

N.Y.U.C.C. §§ 2-204, 2-305, 2-310 (McKinney 1964) A-13

N.Y. Court of Appeals Rule 500.17, N.Y. Admin. Code tit. 22, § 500.17 (1986) A-27

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BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Interest of *Amicus Curiae*

The State of New York, by its Attorney General, Robert Abrams, submits this brief as *amicus curiae.*

New York is one of the financial capitals of the world. It is certainly home to many of the largest, most complex financial transactions, and it is the marketplace of a staggering volume of commercial activity.

Courts located in New York, both state and federal, repeatedly are called upon to resolve a wide variety of business disputes. Predictably, New York caselaw has played a substantial role in the development of the law of commercial transactions. Business people and corporations doing business in New York commonly rely upon the law of New York when negotiating and consummating their contracts. They have come to expect their conduct to be judged by the standards upon which they historically have relied. The State of New York's interest in affirming those expectations and in the orderly development and application of the law of commercial transactions and commercial torts is substantial.

Beyond New York's general interest in the orderly development of commercial law, this case—involving, as it does, how control of great corporations may be bought and sold—has enormous significance for the business community and the economy of the State. It is undisputed that the legal import of the parties' conduct here must be measured by the law of New York. Therefore, the outcome of this case will have a direct impact on how business people and corporations comport themselves while doing business in New York and, in turn, on the perception of the climate for doing business in New York.

Moreover, appellant, Texaco Inc., maintains its principal place of business in New York and is one of New York's largest private employers and most important corporate citizens. Accordingly, the Attorney General submits this brief in order to protect the various interests of New York and to assist the Court in reaching a just resolution of this matter.

SUMMARY OF ARGUMENT

The tort of intentional interference with contractual relations is neither well established nor familiar to the lay public. Therefore, given the extraordinary nature of this case, the trial judge should have expended special care in charting what to the jury were unfamiliar waters: the purpose of the tort, the interests it seeks to protect, and its legal elements—all under the law of a distant state.

The special issues and jury instructions failed to achieve any of those goals. The special issues did not formulate material, ultimate facts under New York law. Instead, they served to mislead the jury. The jury instructions failed to describe the pertinent New York law accurately and to assist the jury in determining whether, under all the circumstances, Texaco's actions constituted improper interference with a legally cognizable interest of Pennzoil.

More specifically, in view of all the circumstances—especially the disputed evidence regarding the existence, validity, and enforceability of Pennzoil's alleged interests—the jury should have been instructed that an agreement to agree or an oral contract for the sale of securities is only entitled to minimal protection from interference by competitors. Likewise, the trial judge should have instructed the jury that even if it found that Pennzoil possessed an enforceable contract with the Getty-related entities, and that Texaco's actions interfered with that contract, it could nonetheless find that Texaco's interference was not improper and did not subject it to liability. Because the jury charge failed to include these instructions and misstated numerous principles of New York law, the judgment of the trial court should be reversed.

ARGUMENT

I

THE SPECIAL ISSUES AND JURY INSTRUCTIONS FAILED TO DESCRIBE ACCURATELY THE ELEMENTS OF THE NEW YORK CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS.

A. Introduction—The jury must determine whether the alleged tortfeasor's conduct was fair and reasonable under the circumstances in deciding whether, under the laws of New York, there was intentional interference with contractual relations.

To prevail on a cause of action for interference with contract, the plaintiff must establish five elements: (1) the existence of a valid contract, (2) the defendant's actual knowledge of that contract, (3) the defendant's intentional interference with the contract, (4) damages, and (5) defendant's improper action or lack of reasonable justification. *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 413 N.Y.S.2d 309 (1978); *see Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956). Although each of these factors is essential to a finding of liability, the test is not to be mechanically applied. Instead, except for those rare cases where liability is clear, proper application of these factors requires balancing the competing interests of the litigants and society as a whole.

In *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980), the Court of Appeals of New York unequivocally adopted the definition of interference with contracts given by the Restatement (Second) of Torts (1977). Speaking for the Court, Judge Hugh Jones quoted section 766 of the Restatement:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry)

> between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

50 N.Y.2d at 189, 428 N.Y.S.2d at 631. Judge Jones explained that "the keystone of the statement is the adverb 'improperly' . . . the definition of which is inconstant and mutable, drawing its substance from the circumstances of the particular situation at hand." *Id.*

The Restatement expressly supports the principle that an interferer is liable only for conduct judged improper in light of all the circumstances:

> The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation.

Section 767, comments b and j; *Guard-Life Corp. v. S. Parker Hardware Mfg.*, 50 N.Y.2d at 190, 428 N.Y.S.2d at 632; 2 New York Pattern Jury Instruction Supplement ("2 NY PJI Supp.") 196; *see Rossi v. Kelly*, 96 A.D.2d 451, 465 N.Y.S.2d 1 (1st Dept. 1984); *United Euram Corp. v. Occidental Petroleum Corp.*, 123 Misc.2d 574, 474 N.Y.S.2d 372 (Sup. Ct. N.Y. Co. 1984). The determination of what constitutes reasonable justification under all the circumstances is generally to be decided by the jury. 2 NY PJI Supp. at 198.

This brief discusses the guidelines developed under New York caselaw to assist the trier of fact in determining whether the plaintiff possessed a contractual right and whether the defendant improperly interfered with it. We demonstrate that the trial judge failed to advise the jury of these guidelines. Accordingly, the Attorney General of the State of New York

submits that the jury charge was fatally defective and therefore he urges this Court to reverse the judgment of the trial court.

B. Special Issue No. 1 And The Accompanying Jury Instructions Fail To Describe Accurately The Law Governing The First Element Of The Cause Of Action—The Existence Of A Valid Contract.

1. The Trial Judge's Refusal To Advise The Jury Of The Four-Factor "Intent" Test Constituted Reversible Error.

Only claimants who establish that they possess a valid contractual right are entitled to broad legal protection from interference with that right. *See Israel v. Wood Dolson Co.* Alluding to this, the jury charge directed the jury to answer Special Issue No. 1.[1] Unfortunately, under New York's law of contract formation, that special issue did not address a material, ultimate fact. In addition, the jury instructions which accom-

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[1] Special Issue No. 1 states:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January 3, 1984, Pennzoil and each of the Getty entities, to wit, the Getty Oil Company, the Sarah C. Getty Trust and the J. Paul Getty Museum, intended to bind themselves to an agreement that included the following terms:

a. all Getty Oil shareholders except Pennzoil and the Sara C. Getty Trust were to receive $110 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least $5 per share within five years;

b. Pennzoil was to own 3/7ths of the stock of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths of the stock of Getty Oil; and

c. Pennzoil and the Sarah C. Getty Trust were to endeavor in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths - 4/7ths basis

Answer "We do" or "We do not." _____ (footnote omitted).

pany the special issue do not accurately describe the law of contract formation as applied in New York.

Generally, New York permits parties to contract in the manner and form they choose. *See Scheck v. Francis*, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970). In determining whether a binding contract exists, it is necessary to examine "the objective manifestations of the intent of the parties." *Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp.*, 41 N.Y.2d 397, 400, 393 N.Y.S.2d 350, 352 (1977). In doing so, the trier of fact should assess the "totality" of the circumstances, including the parties' expressed words and deeds, their situations, and the objectives they were striving to obtain. *Id.* The aim is to allow the parties to realize their reasonable expectations. *See R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 74 (2d Cir. 1984); *Schwartz v. Greenberg*, 304 N.Y. 250, 107 N.E.2d 65 (1952).

Consistent with this approach, parties in New York are free to agree to enter into a binding contract without memorializing their agreement in a fully executed document. *See Winston v. Mediafare Entertainment Corporation*, 777 F.2d 78 (2d Cir. 1985). On the other hand, if the parties do not intend to be bound by an agreement until it is in writing and signed, then no contract arises until that event occurs. *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d at 74. The intent of the parties is controlling, unless it conflicts with other laws. *See Pinnacle Books v. Harlequin Enterprises, Ltd.*, 519 F. Supp. 118, 121-122 (S.D.N.Y. 1981).

Applying New York law, the courts have relied upon several factors to ascertain the intent of the parties: (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contracts; (3) whether all of the alleged contract terms have been agreed upon; and (4), whether the agreement at issue is the type of contract that is usually committed to writing. *Winston v. Mediafare Entertainment Corp.*, 777 F.2d at 80; *Banking & Trading Corp. v. Floete*,

257 F.2d 765, 769 (2d Cir. 1958). The United States Court of Appeals for the Second Circuit has repeatedly emphasized that the last factor cited — usage and custom — should be weighed heavily. *See International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49, 57-58 (2d Cir. 1979) (Friendly, J., concurring); *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d at 75; *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257 (2d Cir.), *cert. denied*, 105 S. Ct. 110 (1984). In this regard, the greater the complexity and importance of the transaction, the more likely that informal communications are intended to be only preliminary, especially where the parties have expressed an intention to execute a definite written agreement. *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d at 262; *see also* 1 A. Corbin, *Corbin on Contracts* § 30 at 105 (1963).

Despite a repeated, heavy reliance by the New York courts upon the four factors cited above (collectively referred to as the "*Winston* test"), the trial judge here, in charging the jury on whether the parties agreed to be bound absent a final, written agreement, refused to inform the jury of these considerations mandated by New York law (Transcript ("Tr.") 5220, 5225, 5227). Thus, the jury was denied the benefit of carefully developed legal guidelines on how the contract formation issue had to be decided consistent with the law of New York. The trial judge's refusal to advise the jury of these guidelines is reversible error.

Texaco argues that had the jury been informed of the *Winston* test, it would have reached a different verdict. Rather than restate Texaco's evidentiary arguments, we emphasize that there is sufficient evidence in the record to support the conclusion that the failure of the jury charge to apprise the jury correctly of the *Winston* test materially prejudiced Texaco's case. For example, references in the January 4, 1984 press releases to an "agreement in principle" that was "subject to the execution of a definitive merger agreement," and language in the draft definitive merger agreements which stated that the agreement was not to become effective until "after execution and delivery of the Agreement," support Texaco's argument

that Pennzoil and the Gettys expressly reserved the right not to be bound in the absence of their formal execution of a definitive merger agreement. *See Dickson v. Mitchell*, 87 A.D.2d 697, 448 N.Y.S.2d 861 (3d Dept. 1982).

Likewise, there was substantial evidence to indicate that the alleged agreement had not been partially performed and that complex material terms of the alleged contract remained open when Texaco submitted its bid on January 5, 1984. Perhaps most importantly, the jury could readily have concluded that Pennzoil and the Gettys did not intend to enter orally into a binding transaction constituting one of the largest, most complex mergers in corporate history. The jury could have found that without some unequivocal expression to the contrary, the established custom of consummating similar transactions in writing should prevail. *See International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d at 57-58 (Friendly, J. concurring); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d at 262.

2. The Jury's Affirmative Response To Special Issue No. 1 Does Not Establish That The Jury Believed That Pennzoil And The Gettys Entered Into A Valid Contract Effective January 3, 1984.

The wording of Special Issue No. 1 directs the jury to find that a contract existed if the Gettys and Pennzoil "intended to bind themselves to an agreement." The quoted language is ambiguous. It permitted the jury to find that a contract existed even if, in the jury's view, the Gettys and Pennzoil agreed only to negotiate further based upon the favorable tenor of their preliminary negotiations. This was reversible error

An informal agreement to agree does not constitute an enforceable contract under New York law. *See Willmott v. Giarraputo*, 5 N.Y.2d 250, 184 N.Y.S.2d 97 (1959); *Candid Productions, Inc. v. International Skating Union*, 530 F. Supp. 1330, 1333 (S.D.N.Y. 1982). Such an understanding is not enforceable legally because it does not set forth in "definite and certain terms every material element of the contemplated bargain." *Pinnacle Books v. Harlequin Enterprises, Ltd.*, 519 F.

Supp. at 121-22. Professor Corbin succinctly described the difference between an enforceable contract and an unenforceable "contract to contract":

> It is quite possible for parties to make an enforceable contract binding them to prepare and execute a subsequent documentary agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. The document is understood to be a mere memorial of the agreement already reached. If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and *the so-called "contract to make a contract" is not a contract at all.*

1 A. Corbin, *Corbin on Contracts* § 29 at 84 (emphasis added).

It appears to be undisputed that at no time during their negotiations did the Gettys and Pennzoil agree on all the material terms of the purported merger agreement. In its brief, Texaco cites evidence to indicate that Pennzoil and the Gettys continued to negotiate material terms after January 4, 1985. For example, those parties never agreed on whether Getty Oil or Pennzoil would purchase the Getty Museum's shares. Acquisition of those shares was critical to the transaction contemplated by the parties. However, while negotiating the definitive merger agreement, they discovered that acquisition of those shares by Getty Oil, as contemplated in the Memorandum of Agreement drafted by Pennzoil, could subject Getty Oil to a $2 billion tax penalty. The trial record does not establish that this critical aspect of the alleged contract was ever resolved.

Significantly, neither Special Issue No. 1 nor the accompanying jury instructions mention the significance of agreement on the "material" terms to a contract. As noted, parties in New York, regardless of their intent, cannot bind themselves unless they have agreed on all material terms. *Pinnacle Books, Inc. v. Harlequin Enterprises*, 519 F. Supp. at 121; *Willmott v. Giarra-*

puto, 5 N.Y.2d at 253, 184 N.Y.S.2d at 98. Here, the framing of Special Issue No. 1 assumes that the three terms listed by the court are the material terms. This misled the jury as to its role. It was up to the jury to decide whether *any* of the listed terms was material, and likewise whether the listed terms were *all* of the material terms. The trial judge's decision to remove that fact-finding function from the jury placed him in the untenable position of rubber-stamping Pennzoil's formulation of the alleged material terms. In essence, he thereby created a new contract and imposed it upon the Gettys. *Candid Productions Inc. v. International Skating Union*, 530 F. Supp. at 1333.

3. The Jury Instructions Accompanying Special Issue No. 1 Are Defective For Additional Reasons.

Initially, we note with some reluctance that the jury instructions accompanying Special Issue No. 1 are, read as a whole, appreciably slanted in favor of Pennzoil's theory of the case. Jury instruction 4, for example, does not offer an explanatory statement of the law, but instead rebuts Texaco's contention that the alleged oral agreement between Pennzoil and the Gettys was too indefinite to be enforceable. Other instructions are fragmented and misstate New York law. Purporting to discuss the meaning of "intent to be bound," instructions 1, 2 and 3 fail to emphasize that the actual intent of the parties is dispositive.

Again, we stress that the *Winston* test, *Winston v. Mediafare Entertainment Corp.*, 777 F.2d at 80, would have provided essential assistance to the jury in reconstructing the parties' intent. At the very minimum, the jury should have been instructed to consider "all of the surrounding circumstances." NY PJI 4:1; *Brown Bros. Electrical Contractors v. Beam Constr. Co.*, 41 N.Y.2d at 400, 393 N.Y.S.2d at 352. Instead, instruction 2 erroneously limits the inquiry to an amorphous examination of "the intent of Pennzoil and the Getty entities as outwardly or objectively demonstrated *to each other* by their words and deeds." (emphasis added).

A full appreciation of the trade practice in a complex transaction involving mergers and acquisitions was crucial to a just disposition of the intent issue. *See Reprosystem B.V. v. SCM Corp.*, 727 F.2d at 262. Yet, the instructions given in this case contain not a single reference to trade practice, custom or usage. The jury was thus marooned. It was forced to deliberate in ignorance of the weight New York law accords to: (1) "the gap between the realities of the formation of complex business agreements and traditional contract formulation," *International Telemeter Corp.*, 592 F.2d at 57 (Friendly, J., concurring); (2) the usual sequence of events involved in complex merger-acquisition transactions, *see* 2 Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* 1584-86 (1968) (quoted in *International Telemeter Corp.*, 592 F.2d at 57 (Friendly, J., concurring)); (3) the use of the label "agreement in principle" as a term of art in tender offer transactions, Freund & Easton, *The Three-Piece Suitor: An Alternative Approach To Negotiated Corporate Acquisitions*, 34 Bus. Lawyer 1679, 1687-88 (1979); and (4) the credence, frequently "decisive," which the law accords to evidence of usage and custom. 1 A. Corbin, *Corbin on Contracts* § 30 at 105.

Jury instruction 4 was especially confusing and especially likely to be harmful because the requirement of contract formation which the instruction purports to address, *viz.* "definiteness," may be particularly difficult for jurors to grasp. This instruction failed to state that an enforceable agreement results only if parties have agreed on the essential terms of the bargain. *Interocean Shipping Co. v. National Shipping & Trading Co.*, 462 F.2d 673, 676 (2d Cir. 1972). It did not even convey the elementary concept that the intent of the parties is controlling. *See V'Soske v. Barwick*, 404 F.2d 495 (2d Cir. 1968).[2]

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[2] Some cases contain broad statements which at first blush appear to conflict. On the one hand, many state that "if a material element of a contemplated contract is left for future negotiations, there is no contract."

(footnote continued)

The trial judge's linkage of Special Issue No. 1 with Jury instructions 5 and 6 also was erroneous. Those instructions pertain to post-contractual matters, *i.e.*, the duty to perform and the parties' option to agree to modify their existing contract. Linkage of these instructions with a special issue on contract formation could only have misled the jury.

Jury instruction 5 is defective for another reason. It implicitly advises the jury that an "agreement to agree" is enforceable, regardless of whether the parties agreed upon the essential terms of the prospective contract. As we have emphasized, this notion is contrary to New York law. *See Willmott v. Giarraputo; Candid Productions Inc. v. International Skating Union;* 1 A. Corbin, *Corbin on Contracts* § 29 at 84.

The first element of intentional interference with contractual relations requires a finding that a valid contract existed. *Israel v. Wood Dolson Co.* Here, the jury charge purported to address whether a contract existed, but failed to include the requirement that the contract be valid. Citing federal and state laws, Texaco argued that the alleged oral contract between the Gettys and Pennzoil was void or voidable. Texaco's arguments clearly were non-frivolous. Nonetheless, the trial judge refused to advise the jury that a valid contract was a prerequisite to recovery for intentional interference with it.

Willmott v. Giarraputo, 5 N.Y.2d at 253, 184 N.Y.S.2d at 97. Others indicate that a binding contract can be formed despite material open issues. *E.g.*, *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 395 N.Y.S.2d 151 (1977). As applied, these concepts are not at odds. Where the parties' conduct manifests assent to a basic agreement, their failure to work out every material term will not bar formation of a contract if a court may fill in "open" terms within the reasonable contemplation of the parties. *E.g.*, *V'Soske v. Barwick*. Courts usually derive such terms from trade custom or usage or course of dealing between the parties. E.g., Uniform Commercial Code §§ 2-204, 2-305, 2-310.

In a transaction such as the instant one, Texaco has argued forcefully that reasonable material terms should not be implied because of the uniqueness of the contract in terms of complexity and size.

The court's elimination of this element of the cause of action was significant. Under New York law, unenforceable contracts are allowed only minimal protection from interference, *see Guard-Life Corp. v. S. Parker Hardware Corp.* 50 N.Y.2d at 192, 428 N.Y.S.2d at 633; *see also* W. Prosser & W. Keeton, *Torts* § 129 at 996 (5th ed. 1984); Restatement (Second) of Torts § 767 at 34. Enforceable contracts are entitled to much greater protection. If properly instructed, the jury could have found that the alleged agreement here was entitled to the same amount of protection as are "precontractual relations" or a voidable contract, *i.e.*, no protection at all or protection only from interference by "wrongful means." *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d at 196; 428 N.Y.S.2d at 636. Instead, the jury was wrongly led to believe that the mere existence of some kind of a contract, whether valid or not, fully satisfied the first element of intentional interference with contract.

In sum, the special issue and jury instructions effectively diluted the legal requirement of a jury finding that the parties intended to be bound. Instead, the court discounted the formalities surrounding contract formation, without emphasizing the heightened significance that the issue of intent assumes where there are no such formalities. Reversible error occurred when the trial judge refused to instruct the jury (1) to apply the *Winston* intent test, (2) to examine the "totality of the circumstances," or (3) to accord great weight to trade practice, custom or usage pertaining to the formation of complex, merger-acquisition transactions.

Furthermore, Special Issue No. 1 and the instructions which accompany it muddled the distinction between a final, binding contract and an unenforceable agreement to agree. This distinction should have been sharply drawn because under New York law, as noted, the amount and kind of protection from interference afforded unenforceable contracts is substantially less than that granted to enforceable contracts. *See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.* Nonetheless, the special issue invited the jury to find that an agreement

to agree or an agreement to negotiate further is enforceable, regardless of the number and the materiality of the terms which were left open.

In practical terms, the jury charge failed to inform the jury accurately how it should determine whether Pennzoil and the Gettys bound themselves contractually. As a result, the jury may well have concluded that the existence of an informal agreement, one which the parties hoped to turn into a contract, was a sufficient ground for finding that the parties "intended to bind themselves to an agreement." Indeed, Special Issue No. 1 effectively affords to preliminary negotiations that are positive in character virtually plenary protection from interference by a third party. Accordingly, the jury charge materially prejudiced Texaco and the judgment should be reversed.

C. Special Issue No. 2 And The Accompanying Jury Instructions Fail To Describe Accurately The Additional Elements Of The Cause Of Action For Intentional Interference With Contractual Relations.

The remaining elements of the cause of action pleaded by Pennzoil include defendant's knowledge of the contract, defendant's intentional interference with that contract, damages, and the impropriety of defendant's interference. *Alvord & Swift v. Stewart M. Miller Constr. Co.*, 46 N.Y.2d at 282, 413 N.Y.S.2d at 312. Ostensibly covering the "knowledge" and "intentional interference" elements of the tort, the trial judge propounded Special Issue No. 2:

> Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found.
>
> Answer: We do or we do not. ___(footnote omitted).

Even a summary perusal of the special issue reveals that it blurs the distinction between discrete elements of the tort, and replaces them with the ambiguous phrase "knowingly interfered."

1. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect The Emphasis New York Law Places On Actual Knowledge Of The Contract.

The jury instructions accompanying Special Issue No. 2 do not correct the inadequate formulation of that special issue. They compound it. Jury instructions 1 and 2, intended to describe the knowledge element of the tort, nowhere mention the term "actual knowledge". New York Pattern Jury Instruction 3:56 states, "Knowledge means *actual awareness*, but the knowledge need only be of the existence of the contract, not of its detailed terms." NY PJI Supp. at 191 (emphasis added). Nonetheless, the language of jury instruction 2 suggests it is proper to impute knowledge to Texaco:

> In order to find that Texaco had knowledge of the agreement, if any, it is not necessary that Texaco had an accurate understanding of the legal significance of the facts which produced the agreement. If Texaco knew the facts that gave rise to the agreement, then it knew of the agreement, even if it did not believe that those facts gave rise to an agreement and even if it believed that any agreement that did exist violated the law. You may also find that Texaco knew of the agreement, if any, if you find that Texaco intentionally or willfully refused to ascertain the facts or if exercised bad faith. Texaco is also charged with all the knowledge, if any, of its agents and representatives, whether communicated to each other or not.

This was, at best, confusing, and more likely was misleading. Under New York law, the alleged tortfeaser must possess actual knowledge that it is interfering with the performance of a contract. *AA Tube Testing Co. v. Sohne*, 20 A.D. 2d 639, 246 N.Y.S.2d 247 (2d Dept. 1964). Imputed knowledge or constructive knowledge is insufficient to sustain the cause of action. *Id.* The alleged interferer's negligent failure to conduct a reasonable investigation does not subject him to liability unless such failure was motivated by ill will. *Entertainment Events, Inc. v. MGM*, No. 74 Civ. 2959 (S.D.N.Y. May 31,

1978); *Kelly v. Central Hanover Bank & Trust Co.*, 11 F. Supp 497 (S.D.N.Y. 1935), *rev'd on other grounds*, 85 F.2d 61 (2d Cir. 1936).

The leading cases discussing this element of the tort are clear: nothing less is required than actual knowledge of either the contractual right alleged to have been breached or the essential facts which give rise to that contractual right. *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 1971), involved an acquisition of the assets and business of a going concern. The defendant was told that a deal had been struck and was shown a purported letter agreement which appeared not to be binding due to lack of mutuality of obligation. Defendant did not ask about, nor was it informed of, the facts and circumstances of prior extensive negotiations between plaintiff and the selling defendants, including a prior oral agreement. Holding that the letter agreement did not put defendant on notice of a contract and that defendant was under no duty to investigate further, the court rejected a claim for inducement of breach of contract. The court stressed that "the intention to induce a party to 'breach' a contract that was not known to be a contract is a contradiction which cannot be implied." *Id.* at 608.

Similarly, in *Entertainment Events, Inc. v. MGM*, the court was asked to find that the defendant was aware of contract modifications to a licensing agreement which extended it and waived its termination provision. The court found that the defendant knew of the original licensing agreement, received a copy of it, and was advised that it was terminable at will. However, the court refused to hold that the actual knowledge element had been satisfied, concluding that the defendant was unaware of the specific facts or conduct which constituted a waiver of the right to terminate the contract at will. *Entertainment Events, Inc. v. MGM*, slip op. at 19-20. *Cf. Kelly v. Central Hanover Bank Trust*, 11 F. Supp. at 513 (actual knowledge not established where defendant's officer pledged stock with actual knowledge of outstanding debentures but

without knowledge of the restrictive covenants in those debentures).

Applying these principles, Texaco argues from the record that it did not have actual knowledge of the private, oral negotiations which Pennzoil alleges gave rise to a contract between it and the Gettys. Texaco further argues that, in any event, the information available did not contradict assurances by representatives of the Gettys that no binding agreement between Pennzoil and the Gettys existed. The court's charge diluted the actual knowledge requirement upon which Texaco properly relied in advancing these arguments. As a result, there is little doubt that the jury was improperly led to undervalue Texaco's evidence that it had no actual knowledge of a contract between Pennzoil and the Gettys.

Lastly, the interests of the public are best advanced by a strict application of the actual knowledge standard. A rule which holds business people liable for interfering with contractual provisions of which they lack knowledge would have a severe and undesirable deterrent effect on numerous socially beneficial business transactions. It would also run contrary to the principle of law that "one is not ordinarily held liable for consequences which one could not have anticipated." *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 156 (2d Cir. 1949) (L. Hand, C.J.).

In sum, jury instructions 1 and 2 fail to emphasize the critical significance that New York law ascribes to the actual knowledge element. Instruction 2 spotlighted factors which would not preclude a finding of knowledge, and overshadowed the basic requirement that Texaco possess actual knowledge of the alleged contract between Pennzoil and the Gettys.

2. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect New York's Focus On Improper Interference.

Perhaps the most harmful defect in the jury charge is its failure to focus the jury's attention on whether Texaco's alleged interference was improper or without reasonable justification.

See Guard-Life Corp. v. S. Parker Hardware Mfg., 50 N.Y.2d at 190, 428 N.Y.S.2d at 632; Restatement (Second) of Torts § 767; W. Prosser & W. Keaton, *Torts* § 129 at 983. As we demonstrate below, this error has two main components. First, the jury should have been advised that the tort of interference with contractual relations is defined in such a manner as to afford varying degrees of protection to different types of contractual relations. Secondly, the jury charge should have stated that even if Texaco knowingly interfered with an enforceable binding contract, the jury, after weighing all the circumstances, could reject Pennzoil's claim if it found Texaco's conduct was not improper.

In New York, flexibility is the hallmark of the cause of action for intentional interference with contractual relations. Because the cause of action implicates the competing private interests of the litigants as well as societal interests, it frequently requires of the fact-finder a delicate balancing of the nature and weight of all concerns involved. The New York Court of Appeals decision in *Guard-Life Corp. v. S. Parker Hardware Mfg.* adopts the factors listed in section 767 of the Restatement for determining whether an intentional interference with contract is "improper." 50 N.Y.2d at 190, 428 N.Y.S.2d at 632.[3] These factors include (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties, *Id.* The court charge here was defective in that it failed

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[3] PJI 3:56 states in pertinent part:

An act (induces the breach, interferes with the performance) of a contract if it is a substantial factor in preventing the completion of the contract .... Whether such an act is improper depends upon whether the actor's conduct is reasonable, taking into consideration ([Use such of the following as are warranted by the evidence]: the means he employed, the contracts rights with which he interfered, the relation between him and the parties to the contract, the interest which he sought to advance or protect, the social interests involved.)

to inform the jury that, in determining whether Texaco was subject to liability under New York law, it must assess the propriety of Texaco's conduct and weigh the competing interests of the parties. We urge this Court so to hold.

a. The Jury Should Have Been Instructed That An Agreement To Agree Or An Oral Contract For The Sale Of Securities Is Entitled To Protection From Interference Only Where Unlawful Means Are Used.

"The interests of the other with which the actor's conduct interferes" is the third factor listed in section 767 of the Restatement. The overwhelming weight of authority, including New York caselaw and the Restatement, differentiates between interference with an existing contract and interference with prospective contractual relations. *See Guard-Life Corp. v. S. Parker Hardware Mfg.*, 50 N.Y.2d at 190, 428 N.Y.S.2d at 632; Restatement § 768 comment a; W. Prosser & W. Keaton, *Torts* § 129 at 995.

An alleged interferer's status as a business competitor of the plaintiff does not sanction interference with an existing, enforceable contract. However, it may warrant interference with *prospective* contractual relationships, where the interference is primarily motivated by business competition, effects no unlawful restraint of trade, and does not employ wrongful means, *e.g.*, physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, or some degrees of economic pressure. *See Optivision, Inc. v. Syracuse Shopping Center*, 472 F. Supp. 665, 685 (N.D.N.Y. 1979); *Susskind v. Ipco*, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dept. 1975); *but see* Jury Instruction 2 to Special Issue No. 2.

Likewise, under New York law, unenforceable or voidable contracts and contracts terminable at will are entitled only to the same protection from interference as are pre-contractual relations. *Guard-Life v. S. Parker Hardware Mfg.*, 50 N.Y.2d at 192, 428 N.Y.S. 2d at 633. (Void contracts are entitled to no protection. Restatement §§ 774, 766.) Unless the alleged

tortfeasor used wrongful means to interfere with an unenforceable or voidable contract, its action does not subject it to liability. *Id.*

Thus, jury instruction 3 is inaccurate. Under New York law, it is not—as was suggested to the jury—improper to interfere with (1) pre-contractual relations, (2) an unenforceable or voidable contract, or (3) a void contract by lawful means, such as "by persuasion alone, by offering better terms, by giving an indemnity against damage claims to the party or parties induced to breach, or by any act interfering with the performance of a legal duty arising from the agreement, such as the good faith duty of performance." Jury instruction 3. Nonetheless, the expansive language of the court's instruction did not permit the jury to distinguish among the different types of contractual relationships and the varying levels of protection afforded to each of them under New York law.

The jury should have been instructed that if it found there was only an agreement to agree or a void or voidable contract, that understanding was entitled to protection from interference only if wrongful means were used by Texaco. Because jury instruction 3 allowed the jury to conclude that an agreement to agree or an oral contract for the sale of securities is entitled to protection from interference by a competitor using lawful means, such as persuasion, to do so, it misstated New York law. This deficiency is particularly critical because, as is discussed hereafter, there does not appear to be any suggestion that Texaco used anything other than lawful means.

b. The Jury Should Have Been Instructed That Whether Texaco's Interference Was Proper Depends Upon Whether Its Conduct Was Reasonable In View Of All The Circumstances.

New York law condemns only "improper" interference with contractual relations even where a plaintiff has established the existence of a valid contract. *See Guard-Life Corp. v. S. Parker Hardware Mfg.* 50 N.Y.2d at 190, 428 N.Y.S.2d at 632;

United Euram Corp. v. Occidental Petroleum Corp. 123 Misc. 2d at 576, 474 N.Y.S.2d at 375; *Rudoff v. Huntington Symphony Orchestra,* 91 Misc. 2d 264, 397 N.Y.S.2d 803 (Sup. Ct. App. Tm. 1977); Restatement § 767, comment b. Inasmuch as the jury charge did not direct the jury to assess the propriety of Texaco's conduct, it failed to inform the jury of a key element of the alleged cause of action.

Addressing the first factor noted in section 767 of the Restatement—the nature of the actor's conduct—we know of no suggestion that Texaco used wrongful means to interfere with Pennzoil's alleged contract. At trial, Texaco indicated that in response to solicitations by the Gettys, it used only lawful means, such as persuasion, and the offering of better terms, and that its conduct violated no business ethics or customs. Similarly, as to the second factor, Texaco's motive, there is evidence in the record to support Texaco's contention that it was motivated solely by a business purpose, rather than by a desire to injure Pennzoil or interfere with its alleged contractual relationship with the Gettys.

Additionally, the actor's knowledge of the contractual right allegedly breached bears upon the motive factor. An actor cannot readily be found to be motivated by an intention to interfere with a contract of which he is unaware. Here, Texaco's knowledge of Pennzoil's alleged contractual rights was vigorously contested by the parties. Texaco argued that it was unaware of the oral discussions that allegedly gave rise to the contract, and that all of the information available to it, including solicitation and assurances from representatives of Getty, and the advice of Texaco legal counsel, indicated that no binding contract existed.

Relying upon the erroneous charge, the jury could nonetheless have found Texaco liable merely if it found that a contract existed, whether or not Texaco had any basis to believe that to the case. Indeed, the jury could have found that Texaco's limited knowledge of or interference with pre-

contractual relations, an agreement to agree or an unenforceable contract was sufficient for holding Texaco liable for intentional interference with contract.

In this case, the third factor—the Pennzoil interests with which Texaco's conduct interfered—should have been given careful attention. Texaco contests the substantiality of those interests. It argues that Pennzoil and the Gettys never entered into a contract because the parties were still in the pre-contractual negotiations stage. Alternatively, Texaco contends that if a contract was formed it was either void or unenforceable (voidable) because it violated federal securities laws and the fiduciary responsibilities of Getty directors and was merely an agreement to agree. Even if the jury believed Texaco's evidence on this point and found there was no binding contract, it nevertheless might have felt constrained, in view of the defects in the jury charge, to hold that Texaco's interference with the Pennzoil-Getty negotiations by lawful means, such as persuasion or an offer of better terms, was improper. This too was reversible error.

With respect to the fourth factor, the interests Texaco sought to advance, Texaco argues plausibly that it sought to further not only its own economic interests, but also those of thousands of Getty Oil shareholders. Furthermore, the interest of the public was also advanced by Texaco's conduct, it asserts; its higher bid for the stock of Getty Oil insured open and vigorous competition for control of a major publicly-owned corporation the assets of which include vast holdings of vital natural resources.

The correlation between this factor and the fifth factor, social interest, is strong. There is arguably great value in having open competition for the assets and control of a major corporation such as Getty Oil. Where, as here, the social utility of an alleged interferer's conduct is high and no wrongful means were employed, the beneficial result of the alleged tortfeasor's action may "require the sacrifice of the claims of

individuals to freedom from interference." Restatement § 767 comment g.[4]

In sum, the jury should have been instructed to assess whether Texaco's conduct was proper in view of all the circumstances, including the nature of Pennzoil's contractual relations; the Gettys' solicitation of higher bids from other investors, including Texaco; the limited information available to Texaco describing whether a contract existed between Pennzoil and the Gettys; the fiduciary duty of the Getty directors to obtain fair value for their shareholders' stock; the interests of those shareholders which were advanced by Texaco's conduct; and the open market, competitive values which were fostered by Texaco's higher bid. *Compare* NY PJI 3:56. The trial judge's failure to give some guidance along these lines was reversible error.

II

THE SPECIAL ISSUES AND JURY INSTRUCTIONS PERTAINING TO PUNITIVE DAMAGES WERE INADEQUATE.

Special Issue No. 4 states:

> Do you find from a preponderence of the evidence that Texaco's actions, if any, were intentional, willful and in wanton disregard of the rights of Pennzoil, if any?

The court referred the jury to Special Issue No. 5 if its answer was affirmative. No jury instructions accompanied Special Issue No. 4. Special Issue No. 5 asked the jury what amount of punitive damages should be awarded to Pennzoil. It was accompanied by a jury instruction which stated:

> Punitive damages means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damages.

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[4] The final factors—proximity or remoteness of the actor's conduct to the interference, and relations between the parties—are not subject to much dispute. If interference occurred, it was direct; Texaco and Pennzoil are business competitors in the oil industry.

This portion of the jury charge, especially the jury instruction, was wholly inadequate. The jury instruction failed to describe the limited circumstances under which an award of punitive damages is appropriate. Instead, the instruction stated simply and simplistically that punitive damages may be awarded in the *discretion* of the jury. This formulation is far more liberal than the standard applied under New York law.

Before charging on punitive damages, a trial court applying New York law must decide whether there is a reasonable basis in the evidence for the jury to find that the defendant's conduct was so gross or wanton as to justify an award of such damages. NY PJI Supp. at 287. Generally, awards of punitive damages are not encouraged. The claimant must present evidence of "actual malice or ill will," *Anthony v. George T. Bye, Inc.*, 243 A.D. 390, 391, 277 N.Y.S. 222, 223 (1st Dept. 1935); a wrong "morally culpable" or "actuated by evil and reprehensible motives," *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 490, (1961); or a wrongful action "done willfully, wantonly or maliciously." *Huschle v. Battelle*, 33 A.D.2d 1017, 308 N.Y.S.2d 235 (1st Dept. 1970). *See Guard-Life Corp. v. S. Parker Hardware Mfg.*, 67 A.D.2d 658, 412 N.Y.S.2d 623 (1st Dept. 1979), *modified on other grounds*, 50 N.Y.2d 183, 428 N.Y.S. 2d 628 (1980)[5]. Moreover, punitive damages are imposed solely for the purpose of vindicating a public right; they are available only where the actions of the alleged tortfeasor are aimed at the public generally or are activated by evil or reprehensible motives. *Walker v. Sheldon; Gravitt v. Newman*, A.D.2d , 495 N.Y.S.2d 439 (2d Dept. 1985); *Philippson v. Hexalon Real Estate, Inc.*, 111 A.D.2d 126, 489 N.Y.S.2d 506 (1st Dept. 1985).

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[5] Pattern Jury Instruction 2:278 instructs that punitive damages are justified only when defendant's action was wanton and reckless or malicious. Moreover, contrary to the jury charge here, PJI 2:278 defines those terms:

> An act is wanton and reckless when it is done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the result upon the rights and safety of others that may flow from the doing of the act or the manner in which it is done. An act is malicious when it is done deliberately with knowledge of plaintiff's rights, and with the intent to interfere therewith.

Given all the circumstances of this case, and the undisputed assertion that Texaco was motivated to secure an advantageous business relationship, rather than to injure Pennzoil, the trial court had no discernible basis to conclude that Texaco's conduct could fairly be characterized as wanton, reckless or malicious. Texaco's brief argues generally and with some force that its conduct promoted, rather than harmed, the public interest; that its higher bid increased the profits of Getty's thousands of shareholders and assisted Getty's directors in discharging their fiduciary responsibility to protect the interests of their shareholders; that open competition for Getty's stock, advanced by Texaco's higher bid, was in the interests of the public at large; and that acquisition and control of the assets of a major corporation, such as Getty Oil, is decided most responsibly in an open, competitive forum. The trial judge simply brushed aside these contentions and, in essence, dropped the whole matter in the jury's lap.

Accordingly, Special Issues Nos. 4 and 5 and the accompanying jury instruction are erroneous and may have materially prejudiced Texaco's case. Indeed, as formulated, Special Issue No. 4 erroneously permits the jury, in its discretion, to award punitive damages merely upon finding that Texaco's conduct was intentional and willful.[6] For all these reasons, the award of punitive damages should be reversed.

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[6] Although Special Issue No. 4 includes a reference to "wanton disregard," neither the special issue nor the jury instruction defines that term. Therefore, it should not be assumed that the jury found Texaco's conduct to be in wanton disregard of Pennzoil's alleged interests.

III

CERTIFICATION OF THE DISPOSITIVE QUESTIONS OF NEW YORK LAW TO THE COURT OF APPEALS OF NEW YORK IS APPROPRIATE IF THIS COURT CONCLUDES THAT NEW YORK LAW IS UNCLEAR.

This brief seeks to describe how the jury charge below substantially misstated the applicable New York caselaw. We believe that, as it pertains to the facts presented here, New York's law is clear. Nonetheless, in the event this Court finds that New York law on these issues is not clear, it should request the Texas Supreme Court to certify the dispositive questions of law to the New York Court of Appeals on the ground that there is no controlling precedent of the Court of Appeals. *See* Rule 500.17, Rules of New York Court of Appeals, N.Y. Admin. Code tit 22, § 500.17 (1986). In view of the great significance of these questions of law to New York, we believe the Court of Appeals is the appropriate forum to create or clarify the standards governing the facts of this case. Accordingly, we join in Texaco's certification request and endorse the procedure it describes for accomplishing the certification (Br. 116).

CONCLUSION

For all the foregoing reasons, the State of New York, as *amicus curiae*, requests that this Court reverse the judgment below. Alternatively, the Court should certify the dispositive questions of law to the Court of Appeals of New York.

Dated: New York, New York
May 12, 1986

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APPENDIX B

No. 01-86-00216-CV

IN THE

Court of Appeals

FOR THE

First Supreme Judicial District of Texas

TEXACO INC.,
Appellant,

v.

PENNZOIL COMPANY,
Appellee.

ON APPEAL FROM THE 151ST DISTRICT COURT,
HARRIS COUNTY, TEXAS

BRIEF *AMICUS CURIAE* OF THE STATE OF DELAWARE*

* Reprinted to comply with Supreme Court Rule 33.

TABLE OF CONTENTS

	Page
THE INTEREST OF THE *AMICUS CURIAE* IN THIS APPEAL	B-1
SUMMARY OF ARGUMENT	B-3
ARGUMENT	B-4
I. THE COURT'S INSTRUCTION CONCERNING THE GETTY BOARD'S FIDUCIARY DUTIES IS INCORRECT AS A MATTER OF LAW	B-4
A. The Getty Board's Fiduciary Duties Required That It Fully Inform Itself Of All Material Facts And Make All Reasonable Efforts To Secure The Highest Price	B-4
B. Delaware Law Prohibits Enforcement Of An Agreement Entered Into In Breach Of Directors' Fiduciary Duties	B-6
II. THE PURPORTED AGREEMENT BETWEEN GETTY AND PENNZOIL IS UNENFORCEABLE UNDER DELAWARE LAW	B-8
CONCLUSION	B-12

TABLE OF CASES AND AUTHORITIES

CASES	Page
Aronson v. Lewis, 473 A.2d 805 (Del. 1984)	B-4
Beard v. Elster, 160 A.2d 731 (Del. 1960)	B-3
ConAgra, Inc. v. Cargill, Inc., 382 N.W.2d 576 (Neb. 1986)	B-7
Elster v. American Airlines, 100 A.2d 219 (Del. Ch. 1953)	B-3
Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974)	B-11
Hecco Ventures v. Sea-Land Corp., C.A. No. 8486 (Del. Ch. May 19, 1986)	B-7
In re Anderson, Clayton Shareholders Litigation, C.A. No. 8387 (Del. Ch. June 2, 1986)	B-11
Lockwood v. OFB Corp., 305 A.2d 636 (Del. Ch. 1973)	B-5
Mau v. Montana Pacific Oil Co., 141 A. 828 (Del. Ch. 1928)	B-3
Mitchell v. Highland-Western Glass Co., 167 A. 831 (Del. Ch. 1933)	B-4
Mullen v. Academy Life Insurance Co., 705 F.2d 971 (8th Cir.), *cert. denied sub nom. Beausang v. Mullen*, 464 U.S. 827 (1983)	B-1
Palmer v. Arden-Mayfair, Inc., C.A. No. 5549 (Del. Ch. July 6, 1978)	B-3
Pennsylvania Co. v. Wilmington Trust Co., 186 A.2d 751 (Del. Ch. 1962), *aff'd sub nom. Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. 1964)	B-5
Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)	B-6, B-7, B-8, B-9, B-10
Robinson v. Pittsburgh Oil Refining Corp., 126 A. 46 (Del. Ch. 1924)	B-5

Page

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) B-5, B-9, B-10, B-11

Thomas v. Kempner, C.A. No. 4138 (Del. Ch. Mar. 22, 1973) B-7

Thompson v. Enstar Corp., C.A. Nos. 7641 & 7643 (Del. Ch. June 20, 1984, revised July 5, 1984 and August 16, 1984) B-7

AUTHORITIES

Restatement (Second) of Conflict of Laws § 302(2), comment (e) (1969) B-3

8 *Del. C.* § 251(b) B-5

The Interest of the *Amicus Curiae* in This Appeal

More than 165,000 large and small businesses—including Getty Oil Company ("Getty"), Texaco Inc. ("Texaco") and Pennzoil Company ("Pennzoil")—are incorporated under the laws of Delaware. Among these businesses are firms representing a majority of the "Fortune 500" companies, over 40 percent of the firms listed on the New York Stock Exchange and about 38 percent of those listed on the American Stock Exchange. Delaware receives approximately $122 million in fees and franchise taxes each year from these companies.

Businesses have chosen to incorporate in Delaware because Delaware's statutory and case law generally provides a clear and responsible statement of the basic rules governing corporate conduct. Delaware has a compelling interest in the fair and accurate enforcement of its laws by other states, because Delaware law governs the rights and duties of all Delaware corporations, and because of the importance of its corporation law to the State.[1]

The State of Delaware, by its Attorney General, Charles M. Oberly, III, has concluded that fundamental principles of Delaware law governing the fiduciary duties of directors of Delaware corporations have not been reflected properly in the judgment below. This brief is submitted by the State of Delaware, as *amicus curiae*, for the purpose of correcting that error.

The State of Delaware is also concerned that this error in the judgment below will have an adverse effect on the continued viability of Texaco. Texaco is important to Delaware, both as a corporate citizen and as a direct and indirect employer of Delaware's residents. Texaco's assets located in Delaware, primarily in the Delaware City Refinery, are valued at more than $400 million. Texaco directly employs almost 700 Dela-

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[1] Moreover, "[t]he courts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law." *Mullen v. Academy Life Insurance Co.*, 705 F.2d 971, 973 n.3 (8th Cir.), *cert. denied sub nom. Beausang v. Mullen*, 464 U.S. 827 (1983).

ware residents and its 1985 payroll in the State exceeded $32 million. Texaco paid over $7 million in State and local taxes in 1985. Delaware also benefits from the substantial tax revenues paid by Texaco's employees residing in Delaware.[2]

As set forth more fully below, the judgment of the trial court resulted from an incorrect application of Delaware law. The State of Delaware, therefore, respectfully requests that the judgment of the court below be reversed.

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[2] In addition, Texaco does substantial business with other companies and individuals in the State of Delaware. It has over 70 branded outlets in Delaware and transacts business with approximately 1,000 local suppliers. From 1983 through 1985, Texaco invested over $27 million in major projects within the State of Delaware.

Summary of Argument

1. The parties agree, and the law is clear, that the fiduciary duties of the board of directors of a Delaware corporation are governed by Delaware law. *See Palmer v. Arden-Mayfair, Inc.*, C.A. No. 5549, slip op. at 20 (Del. Ch. July 6, 1978); *Beard v. Elster*, 160 A.2d 731 (Del. 1960); *Elster v. American Airlines*, 100 A.2d 219 (Del. Ch. 1953); *Mau v. Montana Pacific Oil Co.*, 141 A. 828 (Del. Ch. 1928); *see also* Restatement (Second) of Conflict of Laws § 302(2), comment (e) (1969).

2. The instructions given by the trial court required the jury to ignore the fiduciary obligations of the Getty Oil Company's Board of Directors (the "Getty Board") and that the failure to fulfill those obligations would render an agreement between the Getty Oil Company ("Getty Oil") and Pennzoil unenforceable. Pennzoil does not dispute that unenforceability of an agreement constitutes a defense to tortious interference with contract.

3. The undisputed facts demonstrate that the Getty Board failed to fulfill its fiduciary obligations and did not enter into an enforceable agreement that could form the basis for a claim against Texaco of tortious interference with contract.

ARGUMENT

I. THE COURT'S INSTRUCTION CONCERNING THE GETTY BOARD'S FIDUCIARY DUTIES IS INCORRECT AS A MATTER OF LAW.

Pennzoil has conceded that Instruction No. 5 to Special Issue No. 2 directed the jury to ignore the obligation of the Getty Board to fulfill its fiduciary duties.[3] The Getty Board's failure to fulfill those duties would make any agreement between Pennzoil and Getty unenforceable. This Instruction, therefore, removed from the case a potentially controlling issue of Delaware law and constitutes plain error.[4]

A. The Getty Board's Fiduciary Duties Required That It Fully Inform Itself Of All Material Facts And Make All Reasonable Efforts To Secure The Highest Price.

Delaware law requires that members of the board of directors of a Delaware corporation fulfill their duty of care to inform themselves "prior to making a business decision, of all material information reasonably available to them." *Aronson v. Lewis,* 473 A.2d 805, 812 (Del. 1984). An agreement is not enforceable if based on "an unintelligent and unadvised judgment." *Mitchell v. Highland-Western Glass Co.,* 167 A. 831, 833 (Del. Ch. 1933).

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[3] Pennzoil admitted that this Instruction "advised the jury that the status of the Getty entities as fiduciaries was not relevant to the interference issue," the effect of which was to "exclud[e] evidence from the jury's consideration . . . ." Pennzoil Brief at 155.

[4] Special Issue No. 2 states:

> Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found?

Instruction No. 5 states:

> You may find that Texaco knowingly interfered with the Pennzoil agreement, if any, even though the Getty Oil directors, the Museum's President, and Gordon P. Getty, Trustee, were fiduciaries. If those fiduciaries intended to be bound to an agreement with Pennzoil on January 3, they could not avoid that agreement by later seeking or accepting a higher price or a more beneficial arrangement with a third party.

Thus, fulfillment of a board's fiduciary duties "requires more than the mere absence of bad faith or fraud." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). Rather, "[r]epresentation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information. . . ." *Id.*

The Getty Board's duty fully to inform itself before entering into a merger agreement also is mandated by statute. The Delaware Supreme Court has emphasized that:

> [i]n the specific context of a proposed merger of domestic corporations, a director has a duty under 8 *Del. C.* § 251(b), along with his fellow directors, to act *in an informed and deliberate manner* in determining whether to approve an agreement of merger before submitting the proposal to the stockholders.

Id. at 873 (emphasis added, footnote omitted).

Moreover, when a board authorizes the sale of the corporation, its duty to act in an informed and deliberate manner requires that it act as "auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). A board may not agree precipitously to foreclose bidding under such circumstances. *Id.* at 184. Nor can a board fulfill its fiduciary duties by waiting passively for unsolicited bids to come to its attention. Instead, its role in seeking the highest price and protecting the interests of the shareholders must be "an active one." *Id.* at 184 n. 16.[5]

Instruction No. 5 to Special Issue No. 2 directed the jury to ignore these fundamental rules of Delaware law. The Instruction was plain error, and the judgment of the court below, therefore, should be reversed.

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[5] *See also Lockwood v. OFB Corp.*, 305 A.2d 636 (Del. Ch. 1973); *Pennsylvania Co. v. Wilmington Trust Co.*, 186 A.2d 751 (Del. Ch. 1962), *aff'd sub nom. Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. 1964); *Robinson v. Pittsburgh Oil Refining Corp.*, 126 A. 46 (Del. Ch. 1924).

B. Delaware Law Prohibits Enforcement Of An Agreement Entered Into In Breach Of Directors' Fiduciary Duties.

Instruction No. 5 to Special Issue No. 2 was also inherently defective in that it suggested to the jury that the Getty Board's "inten[tion] to be bound" was sufficient to cause an agreement with Pennzoil to be enforceable. The Instruction directed the jury to disregard the fundamental rule that an agreement will not be enforced when it is entered into in violation of the directors' fiduciary duties.

Lock-ups and related agreements are permitted under Delaware law when their adoption is untainted by breaches of a board's fiduciary duties. In some circumstances such agreements may encourage other bidders to enter the market for control of the corporation, creating an auction for the company and maximizing shareholder wealth. *Revlon*, 506 A.2d at 176, 183.

Agreements which "end an active auction and foreclose further bidding operate to the shareholders' detriment," however, and will not be enforced. *Id.* at 183. In *Revlon*, the Delaware Supreme Court condemned as a breach of fiduciary duty the Revlon board's termination of the bidding process and upheld an injunction against lock-up and no-shopping provisions of a merger agreement which had prevented the auction that should have been conducted. The court reasoned that:

> The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the *maximization of the company's value* at a sale for the stockholders' benefit. . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with *getting the best price* for the stockholders at a sale of the Company.

Revlon, 506 A.2d at 182 (emphasis added).[6] The Revlon directors violated that duty, and the resulting agreement was enjoined.

The Delaware Court of Chancery in *Thomas v. Kempner*, C.A. No. 4138, slip op. at 12 (Del. Ch. Mar. 22, 1973), similarly refused to enforce an assets acquisition agreement "which appears to have been designed to obtain less than the maximum price available for corporate assets because the principle of competitive bidding was ignored."

Agreements which interrupt an active auction process may not be enforced. Only at the conclusion of an auction, when directors already have explored fully the potential for higher offers, may the board bind itself not to pursue higher offers. *See, e.g., Thompson v. Enstar Corp.*, C.A. Nos. 7641 & 7643, slip op. at 7 (Del. Ch. June 20, 1984, revised July 5, 1984 and August 16, 1984) (agreement upheld "after an extensive search for potential buyers . . . for over a month, and after contact with over 100 prospects, and after an in-depth review by 26 seriously interested buyers" resulting in only "one firm offer"); *Hecco Ventures v. Sea-Land Corp.*, C.A. No. 8486, slip op. at 11-12 (Del. Ch. May 19, 1986) (agreement upheld after a five-month search, when "no other bidder has come forward, no one else has offered more . . . and there is no evidence that anyone else may or will"; agreement reached "at the conclusion (and not, as in *Revlon*, in the midst) of the auction process").

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[6] The decision in *ConAgra, Inc. v. Cargill, Inc.*, 382 N.W.2d 576 (Neb. 1986), applying Delaware law, is consistent with *Revlon*. In *ConAgra*, the court held that a "best-efforts" agreement to support the initial offeror could not relieve the board of its duty to recommend for shareholder approval a later offer that represented a better deal to shareholders. *Id.* at 588. Under the plaintiff's theory in that case, the "best efforts" agreement would have required the board to contract away duties—the continuing obligation to exercise its independent judgment in the shareholders' best interests—that they lacked authority to convey. The court ruled that such an agreement was unenforceable and could, therefore, convey no contractual rights which would support plaintiff's tortious interference claim against the subsequently successful offeror. *Id.* at 587-88.

As *Revlon* demonstrates, some agreements which have "destructive effect[s] on the auction process" are unenforceable under Delaware law. Instruction No. 5 to Special Issue No. 2 precluded consideration of these fundamental principles. The jury was misinformed that enforceability of the purported agreement with Pennzoil was determined solely by the directors' "inten[tion] to be bound."

The Instruction was plain error, and the judgment of the court below should be reversed.[7]

II. THE PURPORTED AGREEMENT BETWEEN GETTY AND PENNZOIL IS UNENFORCEABLE UNDER DELAWARE LAW.

Certain facts in the record are undisputed. On the evening of January 2, Getty's investment banker, Goldman, Sachs & Co. ("Goldman Sachs"), informed the Getty Board that $120 per share—$7.50 *more* than Pennzoil's final offer—was the minimum "threshold" fair price for the sale of the company. The Getty Board then specifically requested that Goldman Sachs seek higher offers than the one made by Pennzoil. Goldman Sachs did so.

By the following day, a number of parties told Goldman Sachs that they were interested in making a offer higher than the one made by Pennzoil. Notwithstanding their investment banker's advice on the minimum acceptable fair price and the new information regarding other interested parties, the jury found that on January 3, only 24 hours after the auction had begun, the Getty Board accepted the Pennzoil offer.

Pennzoil's own brief concedes that:

> The board was not forced to approve the Pennzoil transaction. Pennzoil could not purchase Getty Oil shares

[7] Instruction No. 5 to Special Issue No. 2 also constituted error in that it, in substance, directed the jury that if an agreement between Getty and Pennzoil existed, implicit in that agreement was a no-shopping provision. Whether the parties agreed to a no-shopping provision was an issue for the jury and not a proper subject for a court direction.

> under its tender offer for two more weeks. PX 68; SF 3440, 3444, 3882, Kerr; 9962-63, 10091, 11567, Liedtke. The board had ample time, for example, to authorize negotiations with the third parties contacted by Boisi [Getty's investment banker] who had shown interest in paying a higher price but had not yet made offers. SF 10091-93, Liedtke. Instead, the board opted for the certainty offered by the Pennzoil agreement. *As [Getty] board chairman Petersen later admitted: "We thought there was a better deal out there,* but it was a bird-in-the-handish situation. We approved the deal but we didn't favor it." PX 130; SF 5413-14, Petersen; 5510, Nulty.

Pennzoil Brief at 29 (emphasis added).

The entire auction process and negotiation of this extraordinarily complex four-party transaction, involving many billions of dollars, was restricted to a period of 24 hours, "without the exigency of a crisis or emergency." *Smith v. Van Gorkom*, 488 A.2d at 874.[8] Moreover, the bidding process was terminated without allowing any opportunity for the formulation, presentation and analysis of alternative bids. Only two days later, on January 5, Texaco offered $125 per share, $12.50 per share more than Pennzoil had offered, and later increased the offer to $128 per share. Delaware law would not enforce an agreement of merger that had been negotiated and entered into under these circumstances.

As demonstrated in the previous section of this brief, *Revlon* holds that when a decision was made "that the company was for sale," the Getty Board's role became that of "auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon*, 506 A.2d at 182. *Revlon* forbids agreements which end an active auction and foreclose further bidding, because such agreements operate to the shareholders' detriment.

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[8] The Getty Board meeting "continued . . . from 6:00 p.m. on January 2, 1984 until 6:57 p.m. on January 3." Pennzoil Brief at 22.

Here, the uncontradicted facts demonstrate that the Getty Board decided to terminate the bidding process only hours after it had begun and before firm alternative bids—which Getty had solicited in recognition of the fact that Pennzoil's offer was inadequate—could be formulated. This decision by the Getty Board was worse than the one struck down in *Revlon*. A clearer violation of the *Revlon* duty to act as auctioneers and obtain the highest available price would be difficult to imagine. As in *Revlon*, the purported agreement which resulted could not be enforced.

Moreover, not only did the Getty Board fail to seek and obtain the highest price, it failed even to seek a price that its own investment banker considered to be fair. Even in *Revlon*, the board's investment banker at least had approved the fairness of the price per share that Revlon shareholders would receive pursuant to the merger agreement. Here, the Getty Board's investment banker told the Getty Board that $120 per share—$7.50 more per share than Pennzoil's final offer—was the minimum "threshold" fair price for a sale of the company.[9]

We are aware of no case which approves of a board accepting a merger at a price that its own investment banker considered to be below fair value.[10] Indeed, in *Smith v. Van Gorkom*, 488 A.2d at 877 n.19, a breach of fiduciary duty was found in approving a merger agreement when the Chairman of the Board "had deliberately chosen to ignore the advice and opinion of the members of his Senior Management group

[9] Pennzoil's brief concedes that even after the Getty Board meeting on January 3, Getty's investment banker was " 'mad' and a little 'embarrassed' that the Getty Oil board had not held out for a higher price . . . . " Pennzoil Brief at 40.

[10] The lock-up provision rejected in *Revlon* was objectionable precisely because Revlon had agreed to sell two of its divisions for an amount "$100-$175 million below the value ascribed to them by Lazard Freres," Revlon's investment banker. *Revlon*, 506 A.2d at 178.

regarding the adequacy of the $55 price" and the board was not so advised.[11]

After receiving advice that the Pennzoil offer was inadequate and that other parties were interested in making higher offers, "[s]urely the obligation of the [Getty] board at this time [was] to explore in good faith an alternative that, if available, would appear to have a significantly greater present value than [the Pennzoil offer]." *In re Anderson, Clayton Shareholders Litigation*, C.A. No. 8387, slip op. at 7 (Del. Ch. June 2, 1986). The Getty Board did not fulfill that "obligation." Instead, it made a "forced decision on a tight time schedule" without adequate information that deprived it of an "opportunity to make a reasonable and reasoned decision." *Gimbel v. Signal Cos.*, 316 A.2d 599, 614-15 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974).[12]

* * *

[11] That the investment banker for the Sarah C. Getty Trust ("Trust") considered the Pennzoil offer to be fair is of no consequence. Pursuant to the agreement with Pennzoil, the Trust was increasing its ownership interest in Getty from 40.2 to 57 percent without investing any money. The trustee's duty to the Trust beneficiaries was to retain as much money as possible in Getty and to have Getty pay the lowest possible price to public shareholders.

[12] Pennzoil's argument that informed shareholder approval by the J. Paul Getty Museum and the Trust cured any breach by the Getty Board of its fiduciary duties is contrary to Delaware law. In *Smith v. Van Gorkom*, 488 A.2d at 873, the Delaware Supreme Court stated:

> In the specific context of a proposed merger of domestic corporations, *a director has a duty* under 8 *Del. C.* § 251(b), along with his fellow directors, *to act in an informed and deliberate manner* in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. *Certainly in the merger context, a director may not abdicate that duty by leaving to the shareholders alone the decision to approve or disapprove the agreement. See Beard v. Elster*, Del. Supr., 160 A.2d. 731, 737 (1960). *Only an agreement of merger satisfying the requirements of 8 Del. C. § 251(b) may be submitted to the shareholders under § 251(c). See generally Aronson v. Lewis, supra* at 811-13; *see also Pogostin v. Rice, supra.*

(Emphasis added, footnote omitted).

As a matter of Delaware law, the purported agreement between Pennzoil and Getty, as apparently found by the jury, could only have been achieved at the expense of the Getty Board's fulfillment of its fiduciary duties. The State of Delaware respectfully requests that the judgment of the court below be reversed.[13]

CONCLUSION

For the reasons given, and based upon the authorities cited in the foregoing sections of this brief, the State of Delaware respectfully requests that the judgment of the court below be reversed.

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[13] The State of Delaware emphasizes that the facts referred to in the foregoing sections of its brief have been taken largely from Pennzoil's brief, and therefore assume, for the sake of argument only, that a contract was entered into between Pennzoil and Getty on January 3. The State of Delaware is fully aware that Texaco asserts that no such contract ever existed and that, therefore, the directors of Getty acted properly, and in a manner consistent with their *Revlon* duties, in entering into the agreement with Texaco at a price far in excess of that offered by Pennzoil.

Nothing in this brief should be construed to suggest that the State of Delaware agrees that a contract was formed between Pennzoil and Getty or that the directors of Getty did not comply fully in all respects with their fiduciary duties under Delaware law.